In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1179

JOHN RICHARD BURRUP and JAY MELVIN BURRUP,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the United States District Court for the District of Wyoming on ten counts of an indictment charging securities fraud in violation of 15 U.S.C. 77q(a), and on one count charging conspiracy to violate 15 U.S.C. 77 q(a). On June 4, 1965, each was sentenced to two years' imprisonment on each of the eleven counts, the sentences

to run concurrently (Tr. 23, 24).[1] The court of appeals affirmed (Pet. App. 1-5).

The indictment alleged, and the government's evidence (the sufficiency of which is not challenged) established, that petitioners, using the mails in furtherance of the scheme, fraudulently induced the purchase of options (at $5 to $7 per option) to buy common stock in the Pacific-Atlantic Life Insurance Company. The company had been co-founded in 1959 by petitioner Jay Burrup, and petitioner John Burrup was employed as a company salesman (Tr. 169, 205-206. The representations used to induce the sales were, *inter alia*, that Pacific-Atlantic common stock was being offered for sale (when, in truth, the purchasers were being offered options to buy such stock, and the exercise of the options would cost an additional $5 per share of stock); that the proceeds from these sales would be invested directly in Pacific-Atlantic (when in fact, the proceeds were intended to be, and actually were, deposited in petitioners' personal accounts); and that the company was realizing profits and paying substantial dividends (when, in truth, during the first four years of its existence, including the period when these promotional claims were being made, the company had realized no profits and paid no dividends). See *e.g.*, Tr. 75-76, 92, 97, 98-99, 101, 108-109, 148-151.

Petitioner Jay Burrup, in his own defense, testified that the stock options were merely pledged as col-

[1] "Tr." designates the transcript of record on file with the Clerk of this Court.

lateral for personal loans from the alleged victims (*e.g.*, Tr. 180-181), and that he did not know that his brother was selling stock options (Tr. 181). Petitioner John Burrup admitted making the sales, but denied making any misrepresentations (*e.g.*, Tr. 212-214).

2. The government took less than two days to present its case, and, at 1:12 p.m. of the third day, the case was submitted to the jury (Tr. 323-324). Some four hours later, the court, noting that the jury was apparently having a "little difficulty reaching an agreement" (Tr. 324), recalled the jury and, without inquiring into how they stood, gave a version of the *Allen* instruction. See *Allen* v. *United States*, 164 U.S. 492.[2] The defense made no objection to this in-

[2] The court charged (Tr. 324-325):

The Court: Members of the jury, a Court can never ask a jury how you stand. That is reversible error. So a judge has to be very careful on these occasions as to what he says and not to invite any questions from the jury that might do what I have warned you throughout all these proceedings we don't want to do, which is to cause error, that the case might have to be tried again.

I have an instruction here which the Supreme Court of the United States has approved, and the Court of Appeals, which is the court between this Court and the Supreme Court of the United States. It sometimes is helpful to a jury when you are having a little difficulty in agreeing, and I take it that, now that you have been out four hours, you are having a little difficulty reaching an agreement.

The verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, not a mere acquiescence in the conclusions of his fellows.

In order to bring twelve minds to a unanimous result, the jury must consider the questions submitted to them with

struction. The court then asked the jury foreman if there were any of the original instructions that the jury did not understand (Tr. 325). The foreman indicated that there was some confusion, and the jury was thereafter reinstructed as to matters on which it evinced a desire for clarification (*i.e.*, the elements of conspiracy and fraud, and the nature of circumstantial evidence) (Tr. 326-329). The defense noted an objection to these particular supplemental instructions.

Having failed to object at trial to the version of the *Allen* charge given by the trial judge—although

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candor and a proper regard to the opinions of each other.

You must consider that the case must at sometime be decided.

You have been selected in the same manner and from the same source that future jury must be selected. There is no reason to suppose that the case would ever be submitted to twelve men and women more intelligent, more impartial or more competent to decide it, or that more clear evidence would be produced on one side or the other.

With this view in mind, it is the duty of the jury to decide the case, if you can conscientiously do so; that in conferring together, you should pay proper respect to each other's opinions and listen, with a disposition to be convinced, to each other's arguments. If the larger number of the panel are for acquittal, a dissenting juror should listen to the arguments of the majority. He or they should consider whether his reasoning is sound as against arguments of the other men and women equally honest, equally intelligent with himself, and who heard the same evidence with the same attention and with an equal desire to arrive at the truth.

On the other hand, if a majority are for conviction, the minority should seriously ask themselves whether they should not reasonably doubt the correctness of their decision which is not concurred in by most of those with whom you are associated along the lines I have hereinbefore mentioned.

specifically objecting to the other supplemental instructions—petitioner should not be heard to assert error in that charge on appeal. See *Carter* v. *United States*, 333 F. 2d 354, 357 (C.A. 10); Rule 30, F.R. Cr. P. In any event, there is no occasion for further review. The *Allen* charge was reapproved by this Court in *Lias* v. *United States*, 284 U.S. 584, and in *Tomoya Kawakita* v. *United States*, 343 U.S. 717, affirming, 190 F. 2d 506, 521-528 (C.A. 9). And the Court has, in recent years, repeatedly declined to reexamine the validity of the *Allen* charge notwithstanding contentions similar to those made here. See, *Elbel* v. *United States*, 364 F. 2d 127 (C.A. 10), certiorari denied, 385 U.S. 1014; *Estes* v. *United States*, 335 F. 2d 609 (C.A. 5), certiorari denied, 379 U.S. 964; *United States* v. *Kenner*, 354 F. 2d 780 (C.A. 2), certiorari denied, 383 U.S. 958; *Thaggard* v. *United States*, 354 F. 2d 735 (C.A. 5), certiorari denied, 383 U.S. 958; *Walker* v. *United States*, 342 F. 2d 22 (C.A. 5), certiorari denied, 382 U.S. 859. The "mild version" (see opinion of the court of appeals, Pet. App. 2) given in this case did not go beyond the permissible limits. Indeed, as the court of appeals pointed out (Pet. App. 3), the fact that the trial judge gave the instructions before the jury indicated any inability to agree lessened, rather than heightened, the danger of jury coercion resulting therefrom. See *Carter* v. *United States*, *supra*; *Elbel* v. *United States*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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